



1 based on that evidence. Given the exclusionary nature of the  
2 relief sought in the Government's motion, the Court deems its  
3 requests to be in the nature of in limine relief. Consequently  
4 the Court will treat the motion as made in limine rather than as  
5 a request for summary adjudication of issues under Federal Rule  
6 of Civil Procedure 56(d).<sup>1</sup> For the reasons set forth below, the  
7 Government's motion is granted in part and denied in part.<sup>2</sup>

8 The Government's moving papers make it clear that its motion  
9 has a three-fold basis: First, the motion seeks an order  
10 precluding Plaintiffs from offering any testimony of percipient  
11 witnesses on grounds that no timely reports from such individuals  
12 have been submitted. Second, in the absence of percipient  
13 witness testimony, the Government contends that Plaintiffs also  
14 cannot recover damages for their medical treatment without any  
15 testimony to properly establish those damages. Finally,  
16 according to the Government, Plaintiffs cannot recover damages  
17 for their alleged real estate losses stemming from the accident  
18 in question since they failed to exhaust their administrative  
19 remedies for pursuing such a claim.

20 The Government's first two requests both hinge on whether  
21 Plaintiffs can submit percipient witness testimony without having  
22 provided a written report setting forth the opinions to be  
23 offered by such witnesses pursuant to Rule 26(a)(2)(B). The  
24 language of that Rule, however, is clear. A written report is

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26 <sup>1</sup>All further references to "Rule" or "Rules" are to the  
Federal Rules of Civil Procedure unless otherwise noted.

27 <sup>2</sup>Because oral argument would not be of material assistance,  
28 this matter was deemed suitable for decision without oral  
argument. E.D. Local Rule 78-230(h).

1 required with respect to retained, rather than percipient,  
2 witnesses. The Court's February 10, 2005 Pretrial (Status)  
3 Scheduling Order states only that expert designation, and any  
4 accompanying reports, must comply with the requirements of Rule  
5 26(b) (2) (B). It does not state that percipient experts must  
6 furnish the same report required of a retained witness.

7 The Advisory Committee Notes to the 1993 amendment to Rule  
8 26, pursuant to which subdivision (a) (2) (B) was added, states  
9 unequivocally as follows:

10 "The requirement of a written report in paragraph (2) (B),  
11 however, applies only to those experts who are retained or  
12 specially employed to provide such testimony in the case or  
13 whose duties as an employee of a party regularly involve the  
giving of such testimony. A treating physician, for  
example, can be deposed or called to testify at trial  
without any requirement for a written report."

14 This explanatory language applies squarely to the present case.  
15 To the extent the witnesses at issue are percipient, they need  
16 not submit a written report. Moreover, a number of the  
17 individuals in question are physicians or health care providers,  
18 as to whom the Advisory Committee specifically notes that there  
19 is no requirement for a written report.

20 The Government's in limine request to exclude the testimony  
21 of all percipient witnesses for failing to provide a written  
22 report is accordingly denied. In addition, in seeking to  
23 preclude Plaintiffs from offering any evidence in support of  
24 their claim for medical expenses resulting from the accident in  
25 question, the Government contends if Plaintiffs' percipient  
26 experts are excluded they have no expert basis for such damages.  
27 That position fails because the Government's position on  
28 percipient witnesses lacks merit. Plaintiffs' physicians and/or

1 health care providers can offer testimony with respect to the  
2 reasonableness and necessity of medical expenses incurred by  
3 Plaintiffs. Hence the Government's motion to exclude evidence of  
4 Plaintiffs' medical expenses is also denied.<sup>3</sup>

5 The final argument posited by the Government's motion does  
6 have merit. Through this lawsuit, Plaintiffs claim damages for  
7 real estate losses occasioned by their sale of two rental  
8 properties. According to Plaintiffs, they had to sell those  
9 properties because of accident-related injuries (See Dep. Of John  
10 G. Corn, 86:24-87:11). Plaintiffs maintain that because the  
11 properties increased in value following their sale they should be  
12 able to collect that appreciation as accident-related damage.

13 As a prerequisite to bringing an action against the  
14 Government in federal court, Plaintiffs were required to "have  
15 first presented the claim to the appropriate Federal agency..."  
16 28 U.S.C. § 2675(a). A claim is deemed presented for purposes of  
17 § 2675(a) when a party has filed both a written statement  
18 describing the injury and a sum certain damages claim. Blair v.  
19 Internal Revenue Service, 304 F.3d 861, 863-64 (9<sup>th</sup> Cir. 2002);  
20 Warren v. United States Dep't of Interior Bureau of Land Mgmt.,  
21 724 F.2d 776, 780 (9<sup>th</sup> Cir. 1984) (en banc).

22 While both Plaintiffs submitted the necessary administrative  
23 claims to the appropriate governmental agency on or about August  
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25 <sup>3</sup>While the Government also argues that medical expenses, if  
26 allowed, should be limited to monies actually paid for such  
27 expenses as opposed to the stated billing amount, Plaintiffs do  
28 not dispute that California law mandates that result. See Hanif  
v. Housing Authority, 200 Cal. App. 3d 635, 640 (1988); Nishihama  
v. City and County of San Francisco, 93 Cal. App. 4th 298, 306-07  
(2001).

1 28, 2002, neither claim makes any reference whatsoever to alleged  
2 real property losses stemming from this accident, despite the  
3 fact that an itemization of damages is included with respect to  
4 both Mr. and Mrs. Corn that includes detailed subcategories of  
5 general damages, medical expenses, wage loss and loss of  
6 consortium (See Exhibits 1 and 4 to the Government's moving  
7 papers herein).


8 As the Ninth Circuit has recently recognized, "all claims  
9 must be filed with the appropriate agencies before claimants can  
10 bring action in federal court". Blair v. Internal Revenue  
11 Service, 304 F.3d at 864. In Blair, the plaintiff made a sum  
12 certain request for wage loss resulting from personal injuries he  
13 attributed to allegedly wrongful conduct on the part of IRS  
14 agents. The fact that the plaintiff failed to attach a definite  
15 monetary figure to his claimed medical expense caused the Ninth  
16 Circuit to conclude that plaintiff had not satisfied the  
17 administrative prerequisites for suing the government for such  
18 expenses. The plaintiff in Blair consequently failed to pass  
19 statutory muster in presenting a viable medical expense claim  
20 despite the fact that unspecified medical expenses were  
21 specifically mentioned in his administrative claim.

22 In this case, unlike the circumstances confronted by the  
23 Ninth Circuit in Blair, there was no mention at all of  
24 Plaintiffs' alleged real property losses in their administrative  
25 claims. While Plaintiffs attempt to argue that those damages  
26 should be incorporated within their wage loss claims, the two  
27 kinds of purported losses are separate, distinct, and not  
28 interchangeable. In the absence of proper exhaustion, the real

1 property loss claim is not properly before this Court. See id.  
2 at 869. Hence that particular item of damage may properly be  
3 excluded from consideration at trial, and any evidence pertaining  
4 to such claims is the appropriate subject of an in limine  
5 request. The Government's motion in that regard is therefore  
6 granted.

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8 IT IS SO ORDERED.

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10 DATED: July 1, 2005

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14 MORRISON C. ENGLAND, JR.  
15 UNITED STATES DISTRICT JUDGE  
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